SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1213

LEWIS CLINTON PIKE, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

JOHN C. SATTERFIELD
P. O. Box 847
Jackson, Mississippi 39205
Phone (601) 354-2540

ROGER A. BROWN
Birmingham, Alabama

GEORGE E. TRAWICK
Post Office Box 47
Ariton, Alabama 36311
Phone (205) 762-2356
Attorneys for Petitioner

February 26, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Grounds on which Jurisdiction is Invoked	2
Questions Presented for Review	3
Constitutional Provisions and Statutes Involved	5
Statement of the Case	6
Basis for Federal Jurisdiction in Trial Court	11
Reasons Relied On for Allowance of Writ	11
I. Accomplish Corroboration Conflict	11
II. The Tainted Evidence Question	20
III. The Disclosure and Confrontation Question	22
IV. The Self-Incrimination Question	24
V. The Severance Question	27
VI. The Conjuntive—Disjunctive Question	30
VII. The Public Trial—Presence Failure to Record Questions	32
Conclusion	36
Prayer	39

INDEX TO APPENDIX

A. Opinion of the Court of Appeals for the Fifth Circuit	1a
B. Judgment of the United States Court of Appeals for the Fifth Circuit	10a
C. Journal Entry of Judgment of the United States District Court for the Southern Division of the Northern District of Alabama	11a

TABLE OF AUTHORITIES

Page

CASES:

Berness v. State (1955), 263 Ala. 641, 83 So.2d 613 ... 34
Brady v. Maryland (1963), 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 22
Brown v. United States (9 CA 1963), 314 F.2d 293 ... 36
Casalman v. Upchurch (5 CA 1967), 386 F.2d 813 ... 33
Catrino v. United States, 176 F.2d 884, 889 13
DeGruy v. State (1975), 323 So.2d 406, 294 Ala. — .. 36
Edwards v. United States (10 CA 1967), 374 F.2d 24, cert. denied, 88 S.Ct. 48, 389 U.S. 850, 19 L.Ed.2nd 120 .....34, 35
Fiswick v. United States (1946), 329 U.S. 211, 91 L.Ed. 196, 67 S.Ct. 224 26
Fowler v. United States (1962), 316 F.Sup.2d 66 33
Fowler v. United States (5 CA 1962), 310 F.2d 66 ... 36
Heflin v. United States (5 CA 1955), 223 F.2d 371 32
Holmgren v. United States, 54 L.Ed. 868 17
Iannelli v. United States (1975), — U.S. —, 43 L.Ed.2d 616, 95 S.Ct. 1284 .....27, 28, 29, 30
Jenkins v. State of Ga., 418 U.S. 153, 41 L.Ed.2d 642, 648, 94 S.Ct. 2750 8
Juhl v. United States, 388 F.2d 1009, 1015-16 14
Karp v. United States (1960), 362 U.S. 511, 4 L.Ed.2d 921, 80 S.Ct. 945 .....29, 38
Keliher v. United States, 1 Cir., 1912, 193 F. 8, 15 ... 14
Langnes v. Green, 282 U.S. 531, 537, 75 L.Ed. 520, 524 7
Logan v. United States (1892), 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617 25
Miranda v. Arizona (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 ALR 3d 974 .....18, 20, 24
Nardone v. United States (1939), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 10, 20, 22, 37
Parrott v. United States (10 CA, 1963), 314 F.2d 46 .. 35
Pike v. United States (Nov. 17, 1975), 523 F.2d 734 .. 2
Pino v. United States (1967), 125 U.S. App. D.C. 225, 370 F.2d 247 .....31, 32

Page

Pointer v. Texas (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 ..... 23, 37
Rossi v. United States, 9 F.2d 362, 366 16
Russell v. United States (1962), 369 U.S. 749, 8 L.Ed. 240, 82 S.Ct. 1038 32
Sparf v. United States, 156 U.S. 51, 56 and 57, 39 L.Ed. 343, 51 S.Ct. 183 ..... 19, 20
Stansberry v. United States (5 CA 1955), 219 F.2d 165 33
Stephens v. United States (5 CA 1961), 289 F.2d 308 .. 33
Townsend v. Sain (1963), 83 S.Ct. 745, 372 U.S. 293, 9 L.Ed.2nd 770 23
United States v. Ballard, 322 U.S. 78, 88 L.Ed. 1148, 1154 ..... 8, 9
United States v. Glasser, 116 F.2d 690, 703 16
United States v. Hale (1975), — U.S. —, 45 L.Ed.2d 99, 95 S.Ct. (Advance Sheet 1) 24, 27, 37
United States v. Jones (1974), 491 F.2d 1382 32
United States v. Long (5 CA 1969), 419 F.2d 91 ....15, 33
United States v. Murphy, 253 F. 404 (D.C.N.Y. 1918) 15
United States v. Reincke, 416 F.2d 69 19
United States v. Sigal (3 CA 1965), 341 F.2d 837 35
United States v. Trinastich (Mo. 1973), 354 F.Suppl. 54 31
United States v. Upshaw (5 CA 1971), 448 F.2d 1218, cert. denied, 92 S.Ct. 970, 405 U.S. 934, 30 L.Ed.2d 810 33

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

Amendment IV 5
Amendment V 3, 5, 24
Amendment VI 5, 23

STATUTES:

28 U.S.C. 1254(1) 2, 6
28 U.S.C. 753(b)(1) 5, 33
18 U.S.C. 371 27
18 U.S.C. 1955(a) 6, 11, 12, 30

Page

RULES:

Supreme Court Rule 231(g) 11
Rule 8, Federal Rules of Criminal Procedure 28, 29

OTHER AUTHORITIES:

5 Wigmore on Evidence, 3rd Edition 1940, 1367 23
3 Wharton's Criminal Evidence 643 26
33 University of Chicago Law Review 627, 676 (1966) 27
23 Corpus Juris Secundum, Criminal Law, 961 34
23 Corpus Juris Secundum, Criminal Law, 975 35

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Lewis Clinton Pike, the petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 17, 1975.

A timely application to the United States Court of Appeals for the Fifth Circuit for rehearing or in the alternative rehearing *en banc* was denied without opinion on the 29th day of December, 1975.

On January 26, 1976, Associate Justice Lewis F. Powell, Jr. entered an order in case number A-657 extending the time for filing this petition for Writ of Certiorari to and including February 27, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported at 523 F.2d 734 and is attached hereto in Appendix *infra,* pp. 1a thru 9a. The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix hereto, *infra,* p. 10a. The Journal Entry of Judgment of the United States District Court for the Southern Division of the Northern District of Alabama, is printed in Appendix hereto, *infra,* p. 11a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 17th day of November, 1975, and is annexed hereto in Appendix, *infra,* p. 10a.

A timely petition for rehearing or in the alternative rehearing *en banc* was denied on the 29th day of December, 1975.

Jurisdiction was preserved by application filed and granted on January 26, 1976, in number A-657, to the Supreme Court of the United States, for extension of time within which to file this Petition for Writ of Certiorari to and including February 27, 1976.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on the 17th day of November, 1975, is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether there is a conflict between the Courts of Appeal of the several Circuits concerning whether or not a defendant may be convicted upon the uncorroborated testimony of a discredited self-proclaimed accomplice and whether or not the silence of a defendant (while in custody of a federal officer) in the face of a general incriminating statement by a third party may be used as corroborative evidence against him, in violation of his right to remain silent under the Fifth Amendment protection against self-incrimination.

II

When it has been established by defendant that search was illegal and that information garnered from the illegal search and seizure has a causal relation to evidence offered at trial, does not the burden shift to prosecution to establish that the proffered evidence is not tainted by the primary illegality and was gathered independently thereof?

III

Whether petitioner's right to fair trial and confrontation of witnesses was denied by failure of the prosecution to disclose the fact that the only witness against petitioner had a long record of convictions for lottery violations and crimes involving moral turpitude, and had been promised immunity to testify against petitioner in time for him to use the information on cross-examination of the witness.

IV

Whether petitioner PIKE's right under the Fifth Amendment to the United States Constitution not to

be required to incriminate himself was violated by admission into evidence, and the trial court's instructions to the jury to consider, petitioner's silence in the face of a purportedly incriminatory statement made to him while he was being searched by agents of the Federal Bureau of Investigation pursuant to a federal search warrant, there being timely objection to admission and charge.

V

Whether petitioner's right to fair trial was denied by the court's failure to grant him a severance from the other defendants after the court had dismissed the conspiracy count of the indictment.

VI

Whether petitioner's right to fair trial was denied by the trial court's denial of petitioner's motion for judgment of acquittal where the indictment charged the offense in the conjunctive and the evidence, if sufficient at all, established the elements only in the disjunctive.

VII

Whether petitioner's right to fair and public trial, conducted in his presence and hearing, together with his right to have his trial stenographically recorded pursuant to the Court Reporter's Act, 28 U.S.C.A., 753(b)(1), was violated by nine "side-bar conferences" during the course of a two-day trial, conducted out of the hearing of defendant, and obviously disposing of substantial objections made on behalf of petitioner and the record shows that said "side-bar conferences" occurred, but neither they nor the voir dire examination of the jury were stenographically recorded.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I

Constitution of the United States, Amendment IV:

"The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated. . ."

II

Constitution of the United States, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . nor be deprived of liberty, or property, without due process of law."

III

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

IV

Title 28, Section 753(b)

"One of the reporters appointed for each such Court shall attend at each session of the Court . . . , and shall record verbatim by shorthand or by mechanical means which may augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court. . ."

V

Title 18, Section 1955(a), United States Code:

"Whoever conducts, finances, manages, supervises, directs or owns all or any part of an illegal gambling business shall be fined not more than twenty thousand ($20,000.00) Dollars or imprisoned not more than five (5) years or both."

VI

Title 28, Section 1254(1), United States Code:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

Petitioner PIKE was proceeded against in the District Court for the Southern Division of the Northern District of Alabama for a violation of Title 18, United States Code, Section 1955 and on an additional count of conspiracy to violate said section. The conspiracy count was dismissed by the District Court, after evidentiary hearing of motions directed to an illegal search.

Dismissal of the conspiracy count came after the jury had been qualified and empanelled. During the voir dire examination of the venire, the jurors were exposed to the conspiracy count, with its many alleged overt acts.

After dismissing the conspiracy count, the District Judge put petitioner PIKE and six other defendants to trial jointly on the substantive count. There was

much incriminating evidence against the other defendants, but the only direct evidence against PIKE was the testimony of one Ethel Weatherspoon, a self proclaimed accomplice, who said that PIKE came to her home to draw lottery paraphernalia. The alleged paraphernalia was not introduced in evidence, and her testimony was not corroborated in any meaningful way.

Prior to the commencement of the presentation of the evidence on the case in chief for the United States, but after the selection of the jury, the District Court dismissed the conspiracy count of the indictment. The Court then conducted a hearing on defendant's motion to suppress to determine if the illegal search of 1973 had tainted the evidence which the government sought to introduce on the substantive count of the indictment.

In this Petition for Writ of Certiorari we will limit specific references to the points in the record at which objections were made, motions presented and points raised in the Court of Appeals because of the basis of consideration of matters of this nature long recognized by this Court and clearly announced in *Langnes* v. *Green*, 282 U.S. 531, 537, 75 L.Ed. 520, 524 as follows:

> The question then arises: What is the scope of inquiry in this court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but "must enter the judgment, which should have been rendered by the court below on the record then before it." Baker v. Warner, 231 U.S. 588, 593, 57 L.ed. 384, 388, 34 S.Ct. 175. And in Delk v. St. Louis & S.F.R. Co. 220 U.S. 580, 588, 55 L.ed. 590, 595, 31 S. Ct. 617, following Lutcher

> & M Lumber Co. v. Knight, 217 U.S. 257, 267, 54 L. ed. 757, 761, 30 S. Ct. 505, it was held that on certiorari, likewise, the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the circuit (now district) court. In Watts, W. & Co. v. Unione Austriaca Di Navigazoine, 248 U.S. 9, 21, 63 L.ed. 100, 101, 3 A.L.R. 323, 39 S. Ct. 1, it was said that "this court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require;" . . .

All of the matters raised in this Petition for Writ of Certiorari were necessarily involved in the decision of the Court of Appeals and hence will be passed upon by this Court as set forth in *Jenkins* v. *State of Ga.*, 418 U.S. 153, 41 L.Ed.2d 642, 648, 94 S. Ct. 2750 which states generally the applicable rule as follows:

> We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments, a question which appellee asserts is not properly before us because appellant did not raise it on his state appeal. But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice. Raley v. Ohio, 360 U.S. 423, 436, 3 L.Ed.2d 1344, 79 S. Ct. 1257 (1959).

This rule is stated with the reverse approach by this Court in *United States* v. *Ballard*, 322 U.S. 78, 88 L.Ed. 1148, 1154, as follows:

The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. Langnes v. Green, 282 US 531, 538, 539, 75 L ed 520, 524, 525, 51 S. Ct 243; Story Parchment Co. v. Paterson Parchment Poper Co., 282 US 555, 560, 567, 568, 75 L ed 544, 547, 550, 551, 51 S Ct 248. . . . (Emphasis ours).

We respectfully submit that all matters presented in this Petition for Writ of Certiorari were either specifically and expressly raised in the District Court and/or the Court of Appeals, or fall within the above rules announced by this Court.

During the supression hearing the defendants requested the names of the witnesses which the government would call at the trial, as they had previously by motion. The assistant United States attorney requested of the Court that he not be required to disclose the names of said witnesses which request was granted. The witness Weatherspoon was subsequently called and provided the only direct evidence in the government's case against petitioner.

She denied emphatically that she had been promised immunity from prosecution, a fact which the District Attorney was constrained to admit was false. After she had testified, he stipulated that Weatherspoon had been promised immunity.

After completion of her testimony defense counsel discovered a "rap sheet" in possession of the United States attorney which revealed to him for the first time that Weatherspoon had a long list of convictions for lottery law violations and two crimes involving moral turpitude. Defense moved for a mistrial because of the failure of the government to make timely dis-

closure. The trial judge overruled the motion, stating he would allow the witness to be recalled, a procedure to which defendant excepted. He contended the withholding of the information, together with the identity of the witness, denied an element of confrontation, i.e. information needed for effective cross-examination.

Defense further complained of being placed in the precarious position of choosing between recalling Mrs. Weatherspoon under circumstances that the jury might consider singling her out for embarrassment and badgering, or not having the jury informed at all of convictions going to her credibility.

The Court of Appeals, Fifth Circuit, writing through Judge Thornberry, found no error in the admission over Pike's objection of the alleged statement made to him by another defendant at a time when Pike was in effective custody of the F.B.I. agent, who was conducting a search of Pike's person. In general terms, that Court described the statement as "significant corroborating evidence". Similarly, it did not find error in the Trial Judge's charge that the statement could be considered against Pike.

The Court of Appeals also held, in effect, that *Nardone* v. *United States* (1939) 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307, does not place the burden of proof on the government "to convince the trial court that its proof had an independent origin", saying the Trial Judge had dismissed the conspiracy count from "a fear on his part that establishing the starting date posed significant difficulties in avoiding inadvertant references to the illegal search or the products of that search".

The Circuit Court ignored the plain error of nine "side-bar conferences" during the two-day trial of Pike, the indictment couched in the conjunctive rather than the disjunctive, and the failure of the government to make timely disclosure of its intended use of the witness Weatherspoon and her criminal record.

BASIS FOR FEDERAL JURISDICTION IN TRIAL COURT

In compliance with the Supreme Court Rule 23-1. (g) we restate that federal jurisdiction in the court of the first instance is based upon a prosecution brought in the Federal District Court for an alleged violation of Title 18, Section 1955, United States Code.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

There is a conflict between the Courts of Appeal of the several Circuits concerning whether or not a defendant may be convicted upon the uncorroborated testimony of a discredited self-proclaimed accomplice and whether or not the silence of a defendant (while in custody of a federal officer) in the face of a general incriminating statement by a third party may be used as corroborating evidence against him, in violation of his right to remain silent under the Fifth Amendment protection against self-incrimination.

In this case the Court of Appeals was caught up in the mass of evidence against six of the seven appellants, who were convicted herein. Of these seven only three, Pike, Smith and Lee challenged the sufficiency of the evidence to sustain their convictions. There was substantial evidence against Smith and Lee which the Court of Appeals held sustained their conviction. All defendants were found guilty of doing that which is

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done legally and properly by six or seven states, i.e. participating in the maintenance of a lottery. However, in Alabama and other states, such action by individuals constitutes a violation of 18 U.S.C. § 1955. This was a conviction of a crime that did not involve moral turpitude, danger to the public, violence of physical injury to others, fraud or like elements of human conduct. It did, however, at least on the part of six of the defendants, constitute a violation of the above statute.

For more than a year the police officers of the City of Birmingham and the F.B.I. acted in close cooperation in maintaining a long and intensive surveillance of the activities of various appellants. They ascertained the existence of station houses, searched hotel rooms, searched an automobile, searched one or more of the alleged station houses and seized voluminous lottery slips and other gambling paraphernalia and developed other overwhelming evidence that a lottery did exist. All the other defendants, including Huey, were involved in much of this evidence. The defendant Pike was not.

The defendant Pike was not found to be present at any of the locations where the searches and seizures were made, nor was there any reference to him in the records found. He was personally searched under warrant obtained by the F.B.I. but no evidence concerning the lottery was found on his person. There was no testimony against him by any witness that he participated in the lottery or was guilty of the crime charged other than that of a self-proclaimed accomplice. This witness was named Ethel Weatherspoon who admitted that she was a "station house operator" and testified for the United States. *Her testimony was thoroughly discredited by two uncontroverted facts:*

(1) That she committed perjury in this case swearing repeatedly that she had not been promised immunity by the United States although it was thereafter stipulated of record by the attorneys for the United States that she had been promised immunity. She was thereby conclusively demonstrated to be a perjurer in this very case.

(2) She had theretofore been convicted of numerous crimes, two of which involved moral turpitude. Her prior convictions were concealed by the prosecution and withheld from the attorneys for Pike (as well as from the attorneys for the other defendants) in the face of proper requests and motions of defendant Pike. These facts were ascertained only after the jury had ample time to reach a conclusion as to guilt or innocence upon the assumption that Weatherspoon's testimony was of an unimpeached witness, although an admitted accomplice in the lottery.

After diligent search the authorities reveal that there is a conflict between the Courts of Appeal of the several Circuits upon whether or not the defendant may be convicted upon the uncorroborated testimony of an accomplice and particularly a discredited accomplice. This is an important question of federal law and has not been, but should be, settled by this Court.

The existence of this conflict was recognized by the Court of Appeals of the Third Circuit in *Catrino* v. *U.S.*, 176 F.2d 884, 889 as follows:

> Thus, contrary to appellant's contention, convictions in Federal courts may rest upon the uncorroborated testimony of accomplices. Westenrider v. United States, 9 Cir., 1931, 134 F.2d 772, 774. *This is the rule in every Federal Circuit, except*

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possibly the First.[12] (Note 12. Compare Keliher v. United States, 1 Cir., 1912, 193 F. 8, 15.)

The rule in the First Circuit was announced in *Keliher, supra,* which holds at page 15 that there must be sufficient amount of confirmation to satisfy the jury of the truth of the accomplice's story, i.e. corroboration of the testimony of an accomplice, in order to justify conviction of a defendant, the statement of the Court being as follows:

> The testimony of Coleman, if accepted by the jury, covered every point necessary to make out a case against the plaintiff in error. What else we have to discuss further relates only to corroboration. The rule as to corroboration are fully stated in Roscoe's Criminal Evidence (31th Eng. Ed. 1908), at pages 110 and 111. So far as the general rules of English criminal law are concerned, there is no better authority than Roscoe to the extent to which he discusses them. At the closing of his observations he cites two decisions, but he adds:
>
> > "It is not necessary that the accomplice should be corroborated in every particular, for then his testimony would be superfluous; *but there must be a sufficient amount of confirmation to satisfy the jury of the truth of his story.*" (Emphasis ours)

The same rule is followed in the Court of Claims as evidenced by the case of *Juhl* v. *U.S.,* 388 F.2d 1009, 1015-16, which holds that corroboration is necessary. In so ruling the Court stated:

> *The requirement of corroboration* does not mean that the corroborating evidence should cover every element of the offense so as to be sufficient for conviction apart from the accomplice's testimony. Christy v. United States, 261 F.2d 357, 17 Alaska

> 107 (9th Cir. 1958), cert. denied 360 U.S. 919, 79 S.Ct. 1438, 3 L.Ed.2d 1535 (1959). In the circumstances, *it should not consist merely of indifferent facts, but should in some manner connect the accused with the offense.* Arnold v. United States, 94 F.2d 499, 507 (10th Cir., 1938); Keliher v. United States, 193 F. 8, 15-16 (1st Cir., 1912); United States v. Howell, 56 F. 21, 99 (W.D. Mo., 1892), appeal dismissed, 163 U.S. 690, 16 S.Ct. 1202, 41 L.Ed. 315 (1896). ((Emphasis ours)

The Court of Appeals of the Fifth Circuit has recognized that conviction may not be had upon the testimony of a *discredited* accomplice in the case of *U. S.* v. *Long,* 419 F.2d 91, decided December 3, 1969, in which it said:

> The case of United States v. Murphy, 253 F. 404 (D.C.N.Y. 1918), relied upon by appellant is inapposite to the present situation. In Murphy the only evidence of guilt was the thoroughly *discredited* testimony of an accomplice witness. (Emphasis by the Court)

In *Murphy* the Court said:

> Then the court cites Holmgren v. United States, 217 U.S. 509, 30 Sup. Ct. 588, 54 L.Ed. 861, 19 Ann. Cas. 778, which was decided May 16, 1910, about two months before the Richardson Case. In 217 U.S. at pages 523 and 524, 30 Sup. Ct. at pages 588, 592 (54 L.Ed. 861, 19 Ann. Cas. 778), Mr. Justice Day says respecting this subject-matter:
>
> > "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them.*" (Emphasis by the Court)

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> If that rule is to be followed, corroborating evidence is evidence which is independent of the evidence of an accomplice, and which taken by itself, leads to the inference, not only that a crime has been committed, but that the person on trial was implicated in it; *or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime.* (Emphasis ours)

The conflict between the Circuits as to the proper rule involves an important question of federal law which has not been, but should be, settled by this Court. This is illustrated by the decision of the Court of Appeals of the Seventh Circuit in *U. S.* v. *Glasser,* 116 F.2d 690, 703, in which the rule concerning the testimony of an accomplice was stated by that Court as follows:

> However that may be, the rule is that although the testimony of an accomplice should be subjected to close scrutiny and minute examination and weighed with great care and caution and although it may be attacked before the jury as incredible, unworthy of belief and prompted by unworthy motives; *still a conviction may rest upon the uncorroborated testimony of an accomplice.* (Emphasis ours).

The confusion existing between the Circuits is further illustrated by *Rossi* v. *U. S.,* 9 F.2d 362, 366 in which the Court of Appeals of the Eighth Circuit held as follows:

> There is no rule of law in the federal court preventing conviction on the testimony of an accomplice. Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann. Cas. 778; Caminetti v. United States, 242 U.S. 470, 37 S. Ct.

> 192, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168; United States v. Murphy et al (D.C.) 253 F. 404; Ray v. United States (C.C.A.) 265 F. 257; Wagman v. United States (C.C.A.) 260 F. 568. In Holmgren v. United States, supra, the Supreme Court said it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and that before credence was given to such evidence there should be corroborating testimony. This suggestion is a wise one for courts to follow.* (Emphasis ours).

In *Holmgren* v. *U. S.* (cited by the Eighth Circuit) this Court said on page 524 of the opinion (page 868 of 54 L. Ed):

> Be that as it may, the request did not properly state the law, as it assumed that Werta was an accomplice,—a conclusion which was controverted, and against which the jury might have found in the light of the testimony. It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them.* (Emphasis ours).

We respectfully submit that the above question alone is sufficient to warrant this Court to grant the Petition for Writ of Certiorari. This position is supported by the additional and cumulative errors hereinafter detailed.

Further, the Court of Appeals referred to Judge Pointer's cautionary charge to the jury concerning the accomplice's testimony of Weatherspoon stating that such testimony "was itself sufficient to support the conviction of appellants Pike, Smith and Lee."

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However, the only evidence against Pike by Ethel Weatherspoon, the self proclaimed accomplice and admitted perjuror, was that Pike came to her home to draw lottery paraphernalia. The alleged paraphernalia was not introduced in evidence, and her testimony was not corroborated in any meaningful way.

The Circuit Court of Appeals found "significant corroborating evidence" as to the three defendants named above. It did not otherwise describe the "corroborating evidence". The only other "evidence" in the record against Pike was the testimony of an agent of the Federal Bureau of Investigation that during the execution of a search warrant on Pike, at a time when he was leaving a restaurant in Birmingham, one of the other defendants approached and stated, while the search of Pike's person was being made by the F.B.I. agent, "*You didn't get away with it after all*", to which Pike made no reply. This testimony was admitted over the objection of Pike *and the jury was instructed to consider it against him,* also over his objection timely made.

The silence of Pike under these circumstances was a simple exercise of his constitutional rights particularly mentioned above. He was then in custody of an agent of the F.B.I. There is no evidence whatsoever that he was called upon to respond to such statement, if it was made. The submission of this evidence to the jury under charge of the District Judge should be considered against the defendant violates the well recognized rule underlying the protection provided by the "Self-Incrimination Clause". The action of the District Judge is in direct violation of law as stated by this Court in *Miranda* v. *State of Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 714, 86 S.Ct. 1602, and par-

ticularly that portion of the rule stated by this Court as follows:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
>
> From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

This rule was enforced in *United States* v. *Reincke,* 416 F.2d 69, decided by the Court of Appeals Second Circuit on September 8, 1969. In that case a petition for writ of habeas corpus was brought in United States District Court alleging that the defendant's constitutional right to counsel was violated when certain oral incriminating statements he had made were admitted into evidence against him at the state arson trial. In holding that such statements were not admissible the Court said:

> The State record and the record before Judge Blumenfeld demonstrates that incriminating statements were obtained from appellee after the arson investigation had focused on him *and while he was in custody at police barracks.* (Emphasis ours).

The error of the District Court which has been affirmed by the Court of Appeals is further demonstrated by the holding of this Court in *Sparf* v. *United States,* 156 U.S. 51, 56 and 57, 39 LEd 343 51 S Ct 183, in which this Court held as follows:

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> The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence *and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.* (Emphasis ours) . . . But this principle will not sustain the ruling by which the declarations of Hansen, made long after the commission of the alleged murder, and not in the presence of Sparf, were admitted as evidence against the latter. In no state of case were those declarations competent against Sparf. Its inadmissibility as to *him* was apparent. It appeared upon the very face of the question itself.

It is clear in this case that as Pike was in custody of the F.B.I. agent at the time the alleged remark was made by Huey, he was not called upon to respond thereto. If he had done so while in custody of the F.B.I. agent it would have violated his constitutional right against self-incrimination. He was not called upon to respond and hence this case is governed by the second quotation by *Sparf*. It is as if such statement by Huey had been made not in his presence. The fact that he was present and in custody (without any evidence whatsoever of proper action having been taken by the agent as required by *Miranda*) removed all inference of the necessity of contradiction.

II

The Court of Appeals misplaces the burden of proof on the tainted evidence question.

In *Nardone, supra,* it was spelled out:

> "The burden is, of course, on the accused in the first instance to prove to the Trial Court's satisfaction that wire-tapping was unlawfully em-

> ployed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. *This leaves ample opportunity to the government to convince the Trial Court that its proof had independent origin.*"
>
> (Emphasis supplied)

In the case sub judice, petitioner established an illegal 1973 search, and a causal relation between information obtained from that search leading to the identity of the witness Weatherspoon. *She was the fruit of the poisonous tree,* and the burden was on the government to establish that her identity and testimony was acquired independently of the illegal 1973 search.

A subsequent search, in 1974, was held by the District Court to be lawful, but as the Circuit Court pointed out, Pike was not present "in the apartment raided by the F.B.I. in June, 1974. The key evidence linking (him) to the operation of the lottery was the testimony of witness Weatherspoon. . ."

There was no evidence against Pike in the legal search.

The error of the courts below is therefore twofold: First, is not compelling the government to make timely disclosure of the identity of the witness Weatherspoon. This information would have better enabled Pike to show conclusively that Weatherspoon's identity and testimony was fruit of the poisonous tree.

Second, the district court having found the 1973 search illegal, in the face of evidence of causal connection between the identity of Weatherspoon and that illegal search, should have required the govern-

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ment to come forth with proof that it garnered Weatherspoon from an origin independent of the illegal 1973 search. There was no contention that her testimony flowered from the 1974 legal search.

The government offered no proof that it garnered the identity and testimony of Weatherspoon from a origin independent of the illegal 1973 search. This it could have easily done, if it were true. In failing to place this burden of proof on the government the courts below failed to follow *Nardone, supra,* and the writ should be granted to correct this error.

III

The defendants made timely requests of the Government for disclosure under the *Brady* rule* and the Government admittedly failed to disclose the fact that it had information showing Mrs. Weatherspoon, the alleged accomplice of Pike, had a long record of convictions for lottery violations and at least two other crimes involving moral turpitude. After Mrs. Weatherspoon had testified, it was discovered that the Government had failed to reveal this information, so defendants moved for a mistrial contending that the failure to make timely disclosure prevented them from effectively using this information to impeach or discredit the witness. True, the trial judge, after denying defense motions for mistrial, permitted the recall of Weatherspoon to show some of her prior convictions, but as counsel for the defendant contended, this did not satisfy the *Brady* rule. Defendants were not only deprived of the information in time to make effective use of it for impeachment, but were then forced into

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* Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194.

the untenable position of not showing it at all, or recalling her under circumstances that the jury might find overbearing and intended to badger the witness. The Court of Appeals did not write to this point and we respectfully urge that its failure to do so is an injustice to the petitioner.

It is the duty of Federal Courts to scrutinize the record for procedural errors which, even though they do not violate the Constitution, result in failure to ascertain the truth: *Townsend* v. *Sain* (1963) 83 S. Ct. 745, 372 U. S. 293, 9 L. Ed. 2nd 770.

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 *Wigmore,* Evidence 1367 (3d ed 1040). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." *Pointer* v. *Texas,* 380 US 400, 13 L ed 2d 923, 85 S Ct. 1065.

If this Court means what it says, the case sub judice must be reversed and remanded because of the failure of the Government to disclose the identity of the witness Weatherspoon, make timely disclosure of her

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criminal record for impeachment purposes, and the refusal of the lower courts to protect petitioner against these incursions into the constitutionally guarded right of confrontation.

IV

We surmise that the Court lightly regards, at least at first blush, those petitions for writ of certiorari which present an over-abundance of questions for review. It is, therefore, tempting to counsel to have rested this case upon the sole question of whether petitioner's right under the Fifth Amendment not to be required to incriminate himself was violated by the admission into evidence and the Trial Court's instructions to the jury to consider petitioners silence in the face of a purportedly incriminatory statement made to him while he was being searched by Federal Agents pursuant to a search warrant. In *United States* v. *Hale* (1975) —— US ——, 45 L Ed 2nd 99, 95 S Ct Advance Sheet 1), this Court affirmed reversal by the Court of Appeals for the District of Columbia Circuit, which had reversed the District Court for refusing to declare a mistrial when the prosecutor asked the defendant why he had not given the police his alibi when he was questioned shortly after his arrest. *The Trial Court in that case had instructed the jury to disregard the question.* Nevertheless, the Court of Appeals held that inquiry into the defendant's in-custody silence impermissibly prejudiced his defense and infringed upon his right to remain silent under *Miranda* v. *Arizona,* 384 US 436, 468 n 37, 16 L Ed 2d 694, 86 S Ct. 1602, 10 ALR3d 974 (1966).

The case sub judice is much stronger to a reversal, for here the Trial Court not only admitted evidence of

petitioners in-custody silence, but instructed the jury to *consider* it and the Court of Appeals for the Fifth Circuit approved, finding it "corroborative in a significant way", of the testimony of the alleged accomplice, Weatherspoon.

The record is devoid of evidence which the Court of Appeals could have found "corroborative" except the declaration of a co-defendant, C. E. (Bud) Huey, to Movant Pike when Pike was in custody of an F.B.I. agent executing a search warrant of his person. This occurred on the parking lot of a drive-in cafe which Pike was leaving in an incident unrelated to any other development proved during the trial. The F.B.I. agent was allowed to testify over objection that Huey said to Pike, as the latter was being searched, "You didn't get away with it after all".

The grievious error suffered by Movant can be appreciated only when it is remembered that *Huey had been proven by an abundance of evidence to be the operator of the lottery under investigation.* Since it was the government's theory that Pike was his associate, the jury could logically have concluded Huey's inference to be that Pike was indeed a confederate, and perhaps Huey was enjoying Pike's predicament since Huey had been, as the record shows, the object of much surveillance, and was well connected by events of which there was evidence then before the jury to the lottery, while Pike was not.

It is hard to logically assume that this declaratory statement was not regarded as of great importance by the jury in face of the fact that the Court of Appeals itself found the statement sufficiently important to describe it as corroborative "in a significant way."

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The point is that the prejudicial effect of the wrongful admission of a declaration against one other than the declarant will ordinarily require a reversal of the conviction: *Fiswick* v. *U.S.,* 329 U.S. 211, 91 L. Ed 196, 67 S. Ct. 224; *Logan* v. *U.S.,* 144 U.S. 263, 36 L. Ed. 429, 12 S. Ct. 617; Whartons Criminal Evidence, Vol. 3 Sec. 643.

The record shows no other evidence against Pike. No one else connected him. Even the lottery slips and other paraphernalia submitted through the F.B.I. laboratories for fingerprint study failed to connect Pike, for his prints were found on none of the material so examined.

It is settled law that Pike was not called upon to answer Huey while he as being searched and detained. Effectively, he was then in custody, whether the F.B.I. agent characterized it as "custody" or not.

The trial judge not only admitted the declaratory statement into evidence over Pike's objection and exception but instructed the jury that it should be considered *against Pike,* as well as Huey.

Pike pointedly excepted to this portion of the oral charge.

The Court said in the *Hale* case, *supra,* "At the time of arrest and *during custodial interrogation,* innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due

Process in Criminal Detection, Detention, and Trial, 33 U Chi L Rev 627, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in responce to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of incustody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence."

The case sub judice is in direct conflict with *Hale* and should be reversed for this reason alone.

V

We recognize our temerity in presenting the question of whether petitioner's right to fair trial was denied by the Trial Court's failure to sever his case from that of the other defendants after the Court had dismissed the conspiracy count which bound them together. In *Iannelli* v. *United States,* —— U.S. ——, 43 L Ed 2d 616, 95 S Ct 1284 decided March 25, 1975, (Advance Sheet 4) this Court in 5-4 decision held 8 defendants could be convicted of violating both the Organized Crime Control Act, (18 USCS S. 1955) and the general conspiracy statute (18 USCS Sec. 371) for the same acts, saying the presumption created by Wharton's Rule (that the offense of conspiracy and substantive offence merge when substantive offense is proved) is outweighed by congressional intent to retain in 18 USCS 1955 the option to impose an additional sanction for conspiracy to violate that section. Justice Douglas dissented on (1) double jeopardy (2) not congressional intent to permit simultaneous convictions. Justices Stewart and Marshall joined on (2). Mr.

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Justice Brennan dissented on the ground that the ambiguity of Congress "should be resolved in favor of leniency."

As previously indicated, we firmly believe we are entitled to the writ on other questions and would be content to rest our case on less shifting sands but for the deep-seated belief that we are under obligation to attempt a contribution toward resolving a problem striking at the very heart of the right to fair trial.

Every courtroom lawyer knows the improbability of getting a fair trial when many defendants are herded to their destiny, like cattle to slaughter. We all know of the proclivity of jurys to find guilt by association. The theory that multiple defendants may fare better when tried by a judge alone has much merit. The right to trial by jury is only one of the Constitutional safeguards that lose their efficacy in mass trials.

When the net of conspiracy is cast, it hauls back the innocent with the guilty. As pointed out in *Iannelli, supra;* the conspiracy statute is a potent weapon against crime. It is also a grave threat to liberty, for the slightest act may take an innocent man to judgment, simply because of his association with the guilty.

Whatever justification may be found for trying co-conspirators jointly, we beg to question the wisdom and justice of trying those charged with the substantive offense together, especially when they are numerous, and the danger compounded.

This is not a matter which should be addressed to Congress. This Court, by formulation of Rule 8, Rules of Criminal Procedure, provided for the *joinder* of

offenses and defendants in the same indictment and has since tolerated the almost unbridled trial of multiple defendants jointly, even though the rule provides merely that they may be "charged" jointly—not that they shall be *tried* jointly.

Noting the five to four decisions including and preceeding *Iannelli,* we are hopeful that this Court will someday restore to the citizenry the fair trial which most Americans innocently believe is already guarded them by the Constitution. As was said in *Karp* v. *United States,* 362 US 511, 4 L Ed 2d 921, 80 S. Ct. 945, "there is no sure way to protect against it (conviction of the innocent due to mounting proof of the guilt of a co-defendant) except by separate trials. . ." Noting also that the cases leading to *Iannelli* were held sui generis, we even entertain the hope that a review of *this* case will result in the finding of a simple truth: the evidence is insufficient to convict petitioner and the jury was influenced to its verdict by evidence introduced against co-defendants which would not have been persuasive, even if allowed against petitioner, had he been tried alone.

The Federal Rules of Criminal Procedure have served as a model for rules now adopted by many, if not most, of the States. This Court's toleration of mass trials pursuant to Rule 8 now will be the green light for the States to do likewise—try en mass, convict twice for the same acts, ignore fair and orderly trial procedures, and forget about the constitutional proscriptions against double jeopardy.

Ours may be a small and inarticulate cry from the wilderness, coming as it does from the hinterlands of Alabama, but be it remembered that our State was

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the first to promulgate a formal code of ethics for the legal profession—no mean preservator of rights in and of itself. Too, Alabama is justifiably proud of one of its' sons from the red hills of Clay County. The late Hugo Black loved the Bill of Rights and treasured his participation in overturning the infamous *Plessy* case. He believed, as do we, that our Constitutional heritage is ours to keep only so long as we protect it to *all* our citizenry. If Lewis Clinton Pike can be stripped of his right to a fair trial, then it is safe to none of us.

Surely, the present Court is no less concerned with the protection of our fundamental liberties than was Justice Black and his Brothers, who wrote such landmark decisions.

And surely, no right is more essential and worthy of preservation than the right to a fair trial, in which one is held accountable for his own acts, but is not left to the uncertainties and prejudices attendant to joint trials for substantive acts. We respectfully submit, *Iannelli* is no more sacrosanct, no more entitled to stare decisis, than was *Plessy* v. *Ferguson.*

Both cases are contrary to the spirit of the Constitution, and if we could choose only a single reason upon which the writ would be granted, it would be this one.

VI

The indictment, which was read to the Jury, averred a violation of Title 18, United States Code, Sec. 1955, in the conjunctive when it alleged that the defendants were the "operators, etc. . . . *and* owners" of a lottery proscribed by Alabama law. The federal statute actu-

ally uses the word "or" instead of the above-underscored "and". This practice has been deplored in several Circuits and in at least one district the use of the conjunctive instead of the disjunctive in a similar case was held to make the indictment subject to dismissal: *U.S.* v. *Trinastich,* (Mo.) 354 F. Suppl. 54. The Supreme Court does not appear to have written to this problem but in a footnote to an opinion written by him while a Circuit Judge, Chief Justice Burger deplored the practice as unfair and confusing, especially where the indictment is worded in the conjunctive while the statute and the Judge's charge was in the disjunctive, as in the instant case. *Pino* v. *U.S.,* 125 U.S. App. D. C. 225, 370 F. 2d 247, 249.

Petitioner was denied due process in that he was not afforded a hearing in accordance with his notice. Due process clothes him with the right to rely on the indictment as framing the issues between the parties. He had a right to expect the Government to prove him to be the *owner* of the lottery, as charged, and when it failed to do so he was entitled to an acquittal. His Sixth Amendment right to a fair trial was violated when the Government was not required to prove the charge it had brought, and when the trial judge instructed the jury in the terminology of the statute instead of the indictment. The Government elected to charge him with being the *owner* of the lottery, and it is no answer to point out that it thereby assumed a burden greater than the statute imposed. The Constitution demands of due process and fair trial are paramount, and once the Government elected to indict in the conjunctive, these Constitutional considerations require it to carry the burden it assumed.

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Petitioners' motions for acquittal should have been granted: *Russell* v. *United States,* 369 US 749, 8 L ed 2d 240, 82 S Ct 1038.

The writ of certiorari should be granted, not only to protect petitioner's Constitutional rights, but to resolve conflicts in the different circuits in this unfair and confusing practice.

A different view than the position stated in Trinastich is held in the Ninth Circuit. See *United States* v. *Jones* (1974), 491 F 2d 1382, stating that where a crime, denounced disjunctively in a statute, is charged in the conjunctive, proof of any one of the allegations will sustain a conviction.

The Fifth Circuit writes with approbation of the practise denounced in *Pino, supra: Heflin* v. *United States* (1955), 223 F 2d 371, stating "As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to (use) . . . the conjunctive term 'and' and not the word 'or'. . . ."

We submit this apparent conflict among the Circuits and the Districts should be settled, and the Supreme Court has the opportunity to do so by granting the writ in this cause.

VII

The record reflects nine "side-bar conferences" out of the presence and hearing of the defendant and noted but not reported by the Official Court Reporter. This not only violates petitioners' right to be present at every stage of his felony trial and the Constitutional

mandate that trials shall be public but the practice completely disregards the plain Congressional mandate of the Court Reporter's Act, 28 USCA 753 (b) (1).

Failure of trial judges to comply with this statute appears to have been particularly troublesome in the Fifth Circuit and the Courts have not dealt with it uniformly. For instance in the 1969 case of *U.S.* v. *Long* (Ala.) 419 F. 2nd. 91, the Fifth Circuit held that if no objections were made before the District Court or the Court of Appeals, failure to record bench conferences did not require a reversal unless some specific error or prejudice is called to the Court's attention, citing the 1961 5th CCA case of *Stephens* v. *U.S.,* 289 F. 2nd 308, (inability to review specified errors because of failure to record), and the 1962 case of *Fowler* v. *U.S.,* 316 F. Sup. 2nd 66 (involving alleged prejudicial remarks in an unrecorded closing argument). The 1971 case of *U.S.* v. *Upshaw,* (C.A. Ala.) 448 F. 2nd 1218, cert. denied, 92 S. Ct. 970, 405 U.S. 934, 30 L. Ed (2nd) 810, seems to state the construction presently held to in this Circuit wherein it was held that absent a showing that substantial right of defendant was adversely affected by omission from transcripts of opening statements of defense counsel, conviction would not be reversed for lack of complete transcript.

In the *Upshaw* case the Circuit Court did hold that compliance with the statute was mandatory with few exceptions which would be narrowly construed. This follows *Casalman* v. *Upchurch,* (C. A. Ala. 1967), 386 F. 2nd 813, which held compliance is mandatory. Some other Circuits are stronger in requiring compliance with the statute. In *Stansberry* v. *U.S.,* 219 F. 2nd 165, page 169, footnote 6, it was held that non-compliance could not be waived.

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Also see *Edwards* v. *U.S.*, 374 F. 2nd 24, cert. denied, 88 S. Ct. 48, 389 U. S. 850, 19 L. Ed. 2nd 120, where the Tenth (Okla.) Circuit Court holds that the provisions of the statute are strictly observed, and *no request by defendant is necessary.*

This opinion is more in line with the fundamental principle that it is the duty of the Judge to see to a fair trial: 23 C. J. S. 2nd 961.

Time and again defense objections were disposed of at side-bar conferences. Neither the public, the defendant, nor this Court can know in what manner defendant's rights were dealt with during these critical stages of Pike's trial. We only know that the objections were made, counsel was directed by the Court to approach the bench, and the reporter noted side-bar conferences without stenographically recording what was said or done.

We submit this practice violates the organic as well as statutory law, is plain error, was not waived, and of itself requires a reversal of the judgment.

Framers of our Constitution sought to secure us the right of public trial to protect us from the evils of star chamber proceedings. The public is not assured of this fundamental right as long as the appellate courts tolerate covert proceedings by nisi prius courts during trials.

The proposition that a defendant only can waive his right to be present at every state of his felony trial is well stated by the Supreme Court of Alabama in *Berness* v. *State* (1955) 83 So. 2nd 613, 263 Ala. 641:

> "(1) It is fundamental that a defendant has the right to be present at every stage of his trial for the commission of a felony. His presence is in

> fact essential to the validity of his trial and conviction unless there has been a clear and unequivocal waiver of this right by the defendant. . . We now deal with the method by which the defendant's clear and unequivocal right to presence at every stage of trial may be waived. The great weight of authority is summed up in the simple statement found in 23 C.J.S., Criminal Law, Section 975, Page 311: 'It is generally held that a waiver of accused's right to be present during the trial, when permitted, must be made by him personally, and that the right cannot be waived by his counsel unless accused authorizes him so to do.'"

We insist that "presence" at one's trial means entitlement to hear and know what is taking place. Otherwise it would be unnecessary to provide interpretors for defendants who can not understand English. Courts have usually been liberal in their construction of the Bill of Rights to give the citizen meaningful protection. Moreover, the right of public trial and presence at all meaningful stages thereof by the defendant himself is a right interwoven with public interest. Waiver should be closely guarded and never held unless it appears of record to have been intelligently made.

In the case sub judice no such waiver appears and there is no waiver to the failure of the Court Reporter to record voir dire qualification of the jury.

As was said in *Edwards* v. *United States, supra,* ". . . it constitutes error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. *Parrott* v. *United States,* 10 Cir., 314 F. 2d 46; *United States* v. *Sigal, supra;*

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Fowler v. *United States,* 5 Cir., 310 F. 2d 66, Cf.; *Brown* v. *United States,* 9 Cir., 314 F. 2d 293."

It would be a simple matter in every case to have the record reflect what was said in side-bar conferences, and that it was said in the presence and hearing of the defendant in a criminal case. The alternative is to invite "off the record" invasion of Constitutionally protected rights and records that conceal from appellate eyes transactions had in nisi prius courts.

To assure the citizenry in their right to be present at a public trial for criminal offenses and to require compliance by the lower Courts with the Court Reporter's Act, the writ of certiorari should be granted in this case. It is also necessary to resolve the conflict in the lower Courts.

CONCLUSION

In conclusion we respectfully submit that the decision here is in conflict with the decision of other Courts of Appeal and that, in fact, there are numerous conflicting opinions of the Courts of Appeal of the several Circuits as set forth in points numbered I, IV, VI, and VII and that the Court of Appeals here has decided important questions of federal law which have not been, but should be, settled by this Court. Also the decision of the Court of Appeals here conflicts with the applicable decisions of this Court as detailed herein.

The conflict of the various Federal Circuits on the question of whether detention for execution of a search warrant constitutes "custody" within the meaning of *Miranda supra* is scholarly pointed out by the Supreme Court of Alabama in *DeGruy* v. *State* (1975) 323 So. 2d 406, 294 Ala. —, (Advance Sheet Bulletin

2). Application of *Miranda* standards to State custodial interrogations make settlement of this conflict an even more compelling reason for granting the Writ herein.

The Court of Appeals for the Fifth Circuit failed to follow *Nardone, supra,* by not requiring the government "to convince the trial courts that its proof had an independent origin" from the tainted evidence when defendant had met his burden of proving the unlawful search and that a substantial portion of the case against him was a fruit of the poisonous tree.

Moreover, petitioner's right to fair trial and confrontation was denied by the admitted failure of the government to make timely disclosure of the identity of the only witness against petitioner, that the witness had been promised immunity and that the witness had a record of convictions which could have been shown by the defendant for impeachment purposes on cross-examination. In this respect the District and Circuit Courts failed to follow the decisions of this Court throughout the years and recently emphasized in *Pointer* v. *Texas, supra.*

The District Court, with approval of the Circuit Court, stripped petitioner of his right to remain silent, rather than respond to an accusatory statement by a co-defendant, when petitioner was in custody pursuant to a search warrant. In so doing, the lower courts failed to give effect to the Fifth Amendment and to follow the decisions of this Court, particularly *Miranda* and *United States* v. *Hale, supra.*

Scrutiny of the record compels the conclusion that petitioner was convicted, not because of the evidence against him, but because of the mounting proof of the

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guilt of his co-defendants. In keeping with *Karp* v. *United States, supra,* and in the spirit of fairness, petitioner should have been granted a severance when the conspiracy count was dismissed.

Petitioner was denied due process and a fair trial when the Trial Court failed to require the government to prove the indictment as framed. Unfair and confusing use of the conjunctive instead of the disjunctive is widespread in the lower Federal Courts and merits the attention of this Court.

The right of petitioner to be present at every stage of his felony trial, the Constitutional requirement that such trials be public, and the right of petitioner to a complete record on appeal were ignored by the lower courts. Noncompliance with the Court Reporter's Act is wide-spread throughout the districts and not uniformly dealt with among the Circuits. Direction and leadership from the Supreme Court is needed in this area.

Casual scrutiny of the record sub judice reflects that petitioner was not afforded elementary justice. Unless the Writ is granted, the Constitutional guarantees against self-incrimination, protecting the right to a full and fair public trial in the presence and hearing of the defendant, will all become meaningless to this petitioner. We urge that he can be stripped of his rights only at jeopardy to us all.

PRAYER

Wherefore, in consideration of the foregoing special and important reasons, the petitioner respectfully prays that Writ of Certiorari shall issue directed to the Court of Appeals for the Fifth Circuit, and that this cause will be reviewed by this Honorable Court pursuant to the exigencies thereof.

Respectfully submitted,

JOHN C. SATTERFIELD
P. O. Box 847
Jackson, Mississippi 39205
Phone (601) 354-2540

ROGER A. BROWN
Birmingham, Alabama

GEORGE E. TRAWICK
Post Office Box 47
Ariton, Alabama 36311
Phone (205) 762-2356
Attorneys for Petitioner

February 26, 1976

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-4208

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

Lewis Clinton PIKE, Ozane Smith, Clarence Eugene Huey, James Eldridge Hosmer, William Hundley Baker, III, Joseph Earl Taunton and Robert Mace Lee, a/k/a "Bill Bob," *defendants-appellants.*

Nov. 17, 1975

Defendants were convicted in the District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., of violating federal gambling laws and they appealed. The Court of Appeals, Thornberry, Circuit Judge, held that evidence sustained determination that 1974 FBI search was not tainted by 1973 illegal search by city police officers; that trial court's dismissal of conspiracy count for fear that evidence on that count would include references to the illegal search or the products of that search did not require dismissal of the substantive counts; that evidence was sufficient to sustain convictions; and that fact that magistrate issued search warrant after being presented with a completed search warrant and then taking testimony under oath to determine existence of probable cause rather than issuing a search warrant upon submission of sworn affidavit did not invalidate search warrants.

Affirmed.

1. Gaming § 60

Neither fact that FBI's prior suspicions of defendants' involvement in gambling operation were confirmed by illegal search conducted by city police nor the inclusion of

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references to that search in the affidavit supporting the federal search warrant established ipso facto that the search conducted by the FBI was impermissibly tainted by the prior illegal search by city police.

2. Gaming § 60

Evidence that FBI and city police had a very loose and informal collaboration in investigation of gambling activities, that some interchange of information did occur, that, following illegal 1973 search by police, FBI was allowed to examine evidence seized, that the FBI's investigation of illegal gambling activities had already focused on defendants at the time that the police conducted their illegal search, and that the result of that search served only to confirm prior suspicions sustained finding that 1974 search by FBI was not impermissibly tainted by the prior illegal city police search.

3. Criminal Law § 394.5(4)

Given the fact of an illegal search, burden of persuasion lies with the Government to establish that subsequent search is not tainted by the prior illegal search, but the defendants must nevertheless prove that a substantial portion of the case against them was the fruit of the poisonous tree.

4. Grand Jury § 33

Grand juries are not bound by the same rules of evidence which restrict a trial court and grand juries can consider evidence seized in illegal search.

5. Indictment and Information § 144.1(1)

Where trial court dismissed conspiracy count because of fear that Government's effort to establish starting date for the conspiracy would include inadvertent references to illegal search or products of that search, dismissal of con-

spiracy count did not require dismissal of substantive counts on theory that the trial court, in dismissing the conspiracy count, found that the illegal search impermissibly tainted a subsequent search.

6. Criminal Law § 92
Gaming § 98(1)

Testimony by "stationhouse operator" involved in gambling operation that one defendant picked up money from her stationhouse when she was running the lottery and that all wages at her stationhouse were turned in daily to a second defendant and that a third defendant came to her house every week or two to draw winning numbers for the lottery, along with significant corroborating evidence, was sufficient to sustain defendants' convictions for violating federal gambling laws and, consequently, to establish jurisdiction in federal court. 18 U.S.C.A. § 1955.

7. Criminal Law §693

Where second search postdated indictment, and where defendants objected to introduction of the evidence when it was offered at trial, the objections were timely even though no motion to suppress evidence seized in either of two searches was made. Fed.Rules Crim. Proc., rule 41(e), 18 U.S.C.A.

8. Criminal Law § 673(1)

Defendant's failure to request limiting instruction with regard to evidence which had been withdrawn by the United States because it was obtained in a search which postdated the indictment waived any objection which defendant might have had to initial admission of the evidence.

9. Lotteries § 19

Information from previously reliable informant and evidence of extensive law enforcement surveillance of de-

fendant's activities as a runner for lottery, including the passing of lottery slips to other members of the gambling operation, provided probable cause to support warrant for search of defendant's automobile.

10. Searches and Seizures § 3.5

As long as the magistrate conducts a meaningful independent inquiry before affixing his signature, constitutional standards for issuance of search warrant should be regarded as met even though, rather than having submission of sworn affidavit, magistrate is presented with a completed search warrant and then conducts an inquiry into the existence vel non of sufficient probable cause to support the particular search.

11. Searches and Seizures § 3.6(2)

Magistrate's determination of probable cause is entitled to great deference and is conclusive in the absence of arbitrariness.

Appeals from the United States District Court for the Northern District of Alabama.

Before BELL, THORNBERRY and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

Seven appellants challenge their federal gambling convictions. *See* 18 U.S.C. § 1955. All appellants argue that the district court's dismissal of count one of the indictment, charging a conspiracy, required dismissal of count two of the indictment, which set out the substantive gambling offense. Appellants Clinton Lewis Pike, Ozane Smith, and Robert Mace Lee challenge the sufficiency of the evidence to sustain their convictions. Appellant Lee further attacks the admission of evidence seized in a search of his automobile pursuant to a warrant procured by local law enforcement officials. For the reasons discussed below, we affirm the convictions of all appellants.

[1-5] On July 11, 1973, the Birmingham, Alabama, police conducted a search of a hotel room that uncovered evidence of appellants' operation of an illegal lottery. Almost one year later, on June 21, 1974, the FBI raided an apartment in Birmingham, and the search incident to that raid uncovered extensive evidence implicating appellants in the continued operation of the lottery. Judge Pointer below found the 1973 search by Birmingham police officers illegal by reason of a facially insufficient affidavit and warrant. After a lengthy hearing, *see Kolod* v. *United States,* 1968, 390 U.S. 136, 88 S.Ct. 752, 19 L.Ed.2d 962, Judge Pointer also found that the later FBI search was not tainted by the earlier, illegal search by Birmingham police officers. The evidence introduced at the hearing depicted a very loose and informal collaboration between local law enforcement officials and the FBI in their independent investigations of gambling activities in the Birmingham area. Some interchange of information did occur, and after the 1973 search the FBI was allowed to examine the evidence seized by the Birmingham police. However, evidence introduced at the hearing before Judge Pointer also established that the FBI's investigation of illegal gambling activities had already focused on appellants at the time the Birmingham police conducted their illegal search, and the results of that search only served to confirm prior suspicions. Agent Williams testified that the bulk of the information that went into the affidavit supporting the warrant for the 1974 FBI search was derived independently of the evidence seized in the 1973 search, and an examination of the affidavit lends support to the Williams testimony. The affidavit chronicles a long and intensive FBI surveillance of appellants' activities, details information obtained from a previously reliable informant, and absent the few references to the illegal 1973 search, provides a more than adequate factual basis for the magistrate's determination of probable cause. *See Spinelli* v. *United States,* 1969, 393 U.S. 410, 89 S.Ct. 584,

21 L.Ed.2d 637; *Aquilar* v. *Texas*, 1964, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; *United States* v. *Sellers*, 5th Cir. 1973, 483 F.2d 37. Neither the fact that the FBI's prior suspicions were confirmed by the illegal 1973 search nor the inclusion of references to that search in the affidavit supporting the federal warrant *ipso facto* establishes the taint argued by appellants. *See United States* v. *Friedland*, 2nd Cir. 1971, 441 F.2d 855; *United States* v. *Schipani*, 2nd Cir. 1969, 414 F.2d 1262; *cf. Nardone* v. *United States*, 1939, 308 U.S. 338, 341, 60 St.Ct. 266, 268, 84 L.Ed. 307. On the contrary, from our examination of the transcript of the hearing, we cannot say that Judge Pointer erred in finding no taint flowing from the illegal 1973 search to the 1974 FBI raid on appellants' lottery operation. Given the fact of an illegal search, the burden of persuasion lies with the United States to establish the absence of taint. Nevertheless, appellants must "prove that a substantial portion of the case against [them] was a fruit of the poisonous tree." *Nardone* v. *United States, supra; United States* v. *Nolan*, 5th Cir. 1969, 420 F.2d 552, 554-55. Judge Pointer correctly concluded that appellants failed in the necessary proof. Appellants, however, argue that Judge Pointer's dismissal of the conspiracy count was tantamount to a finding that the 1974 FBI search was tainted by the 1973 search, and dismissal of both counts of the indictment was required. The error in appellants' argument stems from a misinterpretation of the reasons behind Judge Pointer's dismissal of the conspiracy count.[1] To

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[1] Appellants apparently believe that Judge Pointer dismissed the conspiracy count because the grand jury that indicted appellants improperly considered evidence obtained by the Birmingham police in the illegal 1973 search. As discussed above, however, Judge Pointer's dismissal of the conspiracy count turned on pragmatic considerations. Assuming for the purposes of argument that appellants are attempting a belated attack on the nature of the grand jury proceedings, it is nevertheless true that grand juries are not bound by the same rules of evidence that restrict a trial court and

have left the conspiracy count in the case would have required the United States to establish a starting date of the conspiracy. Judge Pointer's comments from the bench reveal a fear on his part that establishing the starting date posed significant difficulties in avoiding inadvertent references to the illegal search or the products of that search.[2] Contrary to appellants' assertions, the dismissal of the conspiracy count hinged on an abundance of caution, not a taint running from the 1973 search to the 1974 FBI search. For this reason, Judge Pointer did not err in refusing to grant appellants' motion to dismiss the substantive count.

[6] Appellants Pike, Smith, and Lee challenge the sufficiency of the evidence to sustain their convictions. Viewing the evidence in the light most favorable to the United States, we hold that a reasonable jury could conclude that the evidence is inconsistent with the hypothesis of appellants' innocence. *See, e.g., United States* v. *Warner*, 5th Cir. 1971, 441 F.2d 821, *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. Neither Pike, Smith, nor Lee was present in the apartment raided by the FBI in June, 1974. The key evidence linking these three appllants to the operation of the lottery was the testimony of witness Weatherspoon, a "stationhouse operator" testifying for the United States. She testified that Smith picked up the money from her stationhouse when she was running the

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can consider evidence seized in an illegal search. *See United States* v. *Calandra*, 1974, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561.

[2] The following comments by Judge Pointer are illustrative.

> But in the more traditional manner, that is what we get back into with Count One [the conspiracy count] where I'm not sure we can cure the matter . . . [i]f you're going to get into the facts and events that took place in June or July, 1973, without having a very difficult time separating out what is connected with the raid and what isn't.

Appendix at 102.

lottery and that all wagers at her stationhouse were turned in daily to appellant Lee. Witness Weatherspoon further testified that appellant Pike came to her house "every week or sometimes every two weeks" to draw the winning numbers for the lottery. Coupled with Judge Pointer's cautionary charge to the jury, the accomplice testimony of Weatherspoon was itself sufficient to support the convictions of appellants Pike, Smith, and Lee. *See Peel* v. *United States*, 5th Cir. 1963, 316 F.2d 907, *cert. denied*, *Crane* v. *United States*, 375 U.S. 896, 84 S.Ct. 174, 11 L.Ed.2d 125. In addition, however, significant corroborating evidence was before the jury. Appellants' arguments to the efficiency of the evidence are rejected. This being the case, appellants' jurisdictional arguments are similarly rejected. *See United States* v. *Bridges*, 5th Cir. 1974, 493 F.2d 918.

[7-11] Appellant Lee challenges the admission of lottery slips and other gambling paraphernalia seized in two searches of his automobile pursuant to local warrants on October 1, 1974, and October 9, 1974. The United States withdrew the evidence obtained in the second search because that search postdated the indictment returned against appellant. No Rule 41(e) motion to suppress the evidence seized in the two automobile searches was made. However, at the time the United States proposed to introduce the evidence, Judge Pointer allowed appellant to make his objections. Given this sequence of events, the objections made at trial must be regarded as timely.[3] *See Newman* v. *United States*, 5th Cir. 1960, 277 F.2d 794, 797. From our independent examination, we conclude that

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[3] Appellant Lee subsequently failed to request a limiting instruction with regard to the evidence withdrawn by the United States, and thus waived any objections he might have had to the initial admission of that evidence. Appellant's objections to the evidence seized in the first search of his automobile were, however, properly preserved.

Judge Pointer correctly determined that sufficient factual information was available to the local magistrate to support a finding of probable cause to search appellant's automobile.[4] In addition to information received from a previously reliable informant, *see Aquilar* v. *Texas, supra; United States* v. *Bell*, 5th Cir. 1972, 457 F.2d 1231, the local magistrate was apprised of observations made in the course of an extensive law enforcement surevillance of appellant Lee's activities as a "runner" for the lottery which included the passing of lottery slips to other members of the gambling operation. Appellant's search and seizure argument thus fails.

The Court having given lengthy consideration to all arguments raised in this appeal, the convictions of all appellants should be and are affirmed.

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[4] Appellant Lee also challenges the local Birmingham procedure whereby a completed search warrant is presented to the magistrate who then places the submitting officer under oath and conducts an inquiry into the existence or nonexistence of sufficient probable cause to support the particular search. The more typical procedure involves the submission of a sworn affidavit. The real difference in a probable cause evaluation made on the basis of factual matters set out in an affidavit or in a completed search warrant is difficult to see. As long as the magistrate does conduct a meaningfully independent inquiry before affixing his signature, the constitutional standards should be regarded as met. In all events, the magistrate's "determination of probable cause should be paid great deference by reviewing courts," *Spinelli* v. *United States*, 1969, 393 U.S. 410, 419, 89 S.Ct. 584, 591, 21 L.Ed.2d 637; *United States* v. *Hill*, 5th Cir. 1974, 500 F.2d 315, 319, and in the absence of arbitrariness that determination is conclusive. *Bastida* v. *Henderson*, 5th Cir. 1973, 487 F.2d 860, 863, citing *Castle* v. *United States*, 5th Cir. 1961, 287 F.2d 657.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-4208

D.C. Docket No. CR-74-P-346-S

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LEWIS CLINTON PIKE, OZANE SMITH, CLARENCE EUGENE HUEY, JAMES ELDRIDGE HOSMER, WILLIAM HUNDLEY BAKER, III, JOSEPH EARL TAUNTON, and ROBERT MACE LEE, a/k/a "Bill Bob," *Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Alabama

Before BELL, THORNBERRY and MORGAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

(FILED JANUARY 13, 1976)
Issued as Mandate: January 12, 1976
(SEAL)

November 17, 1975

A true copy
Test: EDWARD. W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ MARY BETH BRECUP
Mary Beth Brecup
Deputy
New Orleans, Louisiana

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DIVISION OF THE NORTHERN DISTRICT

OF ALABAMA

No. CR-74-P-346-S

UNITED STATES OF AMERICA

v.

LEWIS CLINTON PIKE

On this 27th day of November, 1974 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty to Count 2 of the offense of unlawfully and knowingly conducting an illegal gambling business, said illegal gambling business involving a lottery, in violation of 18 USC 1955, Count 2; as charged in Count 2 of the indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and hereby fined Twenty Thousand ($20,000.00) Dollars, to stand committed for payment of said fine December 23, 1974; or until otherwise discharged as provided by law.

IT IS ADJUDGED that execution of said sentence, be, and it hereby is suspended until December 23, 1974 at 9 A.M., at which time said defendant shall surrender himself to the United States marshal at Birmingham, Alabama, to begin service of said sentence.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

.....

/s/ SAM C. POINTER
Sam C. Pointer
United States District Judge

.....
Clerk

A True Copy. Certified this ..... day of .....
.....

(*Signed*) .....
Clerk

(*By*) .....
Deputy Clerk

(SEAL)

INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 3

Conclusion 11

CITATIONS

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 8

Alderman v. *United States*, 394 U.S. 165 6

Baxter v. *Palmigiano*, No. 74-1187, decided April 20, 1976 7

Brown v. *United States*, 411 U.S. 223 6

Casalman v. *Upchurch*, 386 F.2d 813 11

Dirring v. *United States*, 353 F.2d 519 11

Edwards v. *United States*, 374 F.2d 24 11

Gerberding v. *United States*, 471 F.2d 55 10

Juhl v. *United States*, 383 F.2d 1009, reversed, on other grounds *sub nom. United States* v. *Augenblick*, 393 U.S. 348 5

Keliher v. *United States*, 193 Fed. 8 5

Lawn v. *United States*, 355 U.S. 339 8

Cases cont'd:

Page

Miranda v. *Arizona*, 384 U.S. 436 8

Nardone v *United States*, 308 U.S. 338 6

Schaffer v. *United States*, 362 U.S. 511 10

Simmons v. *United States*, 390 U.S. 377 6

Turner v. *United States*, 396 U.S. 398 10

United States v. *Castro*, 476 F.2d 750 5

United States v. *Cioffi*, 487 F.2d 492, certiorari denied *sub nom. Ciuzio* v. *United States*, 416 U.S. 995 10

United States v. *Curry*, 471 F.2d 419, certiorari denied *sub nom. Ciraole* v. *United States*, 411 U.S. 967 5

United States v. *Hale*, 422 U.S. 171 7

United States v. *Ippolito*, 438 F.2d 417, certiorari denied, 402 U.S. 953 10

United States v. *Jenkins*, 442 F.2d 429 11

United States v. *Jones*, 491 F.2d 1382 10

United States v. *Lee*, 506 F.2d 111, certiorari denied, 421 U.S. 1002 4-5

United States v. *Long*, 419 F.2d 91 11

United States v. *Miceli*, 446 F.2d 256 5

United States v. *Pauldino*, 443 F.2d 1108, certiorari denied, 409 U.S. 1006 10

United States v. *Projansky*, 465 F.2d 123, certiorari denied, 409 U.S. 1006 5

Cases cont'd:

Page

United States v. *Ross*, 477 F.2d 551, certiorari denied sub nom. *Sain* v. *United States*, 414 U.S. 912 5

United States v. *Sigal*, 341 F.2d 837 11

Wong Sun v. *United States*, 371 U.S. 471 6

Statutes and rules:

18 U.S.C. 1955 ..... 2, 9, 10

28 U.S.C. 753 11

Federal Rules of Criminal Procedure:

Rule 8(b) 10

Rule 14 10

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1213

LEWIS CLINTON PIKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 523 F.2d 734.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1975. A petition for rehearing or, in the alternative, rehearing *en banc* was denied on December 29, 1975. On January 26, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 27, 1976. The petition was filed on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to sustain petitioner's conviction.

2. Whether certain testimony should have been excluded as the fruit of an illegal search.

3. Whether testimony concerning petitioner's silence in the face of an accusatory statement by a co-defendant in petitioner's presence was properly admitted into evidence.

4. Whether any of the following contentions, not presented to the court below, requires the reversal of petitioner's conviction.

a. that the disclosure of a government witness's arrest record after the witness had been initially excused but prior to her recall for further testimony precluded effective cross-examination of the witness;

b. that the court's denial of petitioner's motion for a severance denied him a fair trial;

c. that the offense charged in the indictment did not accord with the proof at trial; and

d. that the failure to record side-bar conferences violated the Court Reporters Act as well as petitioner's right to be present at every stage of his trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner and six co-defendants were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner was sentenced to five years' imprisonment and was fined $20,000. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial established the existence of an extensive lottery in Birmingham, Alabama. Approximately fifty persons took bets in connection with the lottery, turning over their receipts to fourteen "station houses."

The receipts were in turn relayed from the "station houses" to personnel at the lottery "counting house," or headquarters (Tr. 303, 313-317, 353-360, 461-470). Ethel Weatherspoon, a "station house" operator who appeared as a witness for the government, testified that after she had been put in charge of a "station house" petitioner had delivered to her the set of numbered wooden balls used to draw the winning numbers in the lottery (Tr. 311). She also testified that after one set of wooden balls had been seized from her "station house" by the Birmingham police, petitioner gave her a second set (Tr. 312-315). According to Weatherspoon, petitioner frequently came to her house to permit her to draw the winning lottery numbers: "[S]ometimes he would come every week or sometimes once every two weeks * * *" (Tr. 310).

ARGUMENT

1. Petitioner first contends (Pet. 11-18) that the only evidence of his guilt was the testimony of an admitted participant in the lottery, Ethel Weatherspoon, and that such testimony was not sufficient to sustain his conviction because it was not corroborated and because Weatherspoon was "discredited" on cross-examination.

Even if it be assumed that Weatherspoon's testimony concerning petitioner's involvement in the lottery was not corroborated (but see *infra* at pp. 6-8), it does not follow that the evidence was insufficient to support his conviction. Weatherspoon's testimony, if believed, provided direct and unequivocal evidence of petitioner's guilt. Whether her testimony was worthy of belief, or

whether she had been discredited on cross-examination,[1] was a matter properly submitted to the jury with a cautionary instruction concerning the use of "accomplice" testimony.[2] See *United States* v. *Lee*, 506 F.2d 111,

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[1]Petitioner contends that Weatherspoon was discredited at trial because of "uncontroverted" evidence that she committed perjury when she denied that she had been promised immunity in exchange for her cooperation with the government. As the Assistant United States Attorney explained, however: "I did tell this witness at the grand jury, and there were other persons appearing at the grand jury, and I did not speak directly to her, but I did tell each of those persons the purpose of the grand jury and the persons [who] testified as to the truth would be granted use * * * immunity. I'm sure that in effect passed over her head. She might not have understood that, and it is apparent from the testimony she did not recall it" (Tr. 361). In any event, whether Weatherspoon had been discredited, as petitioner contends, was a matter appropriately submitted to the jury after having been fully explored in closing arguments (*e.g.*, Tr. 535-537, 543-546, 567-569, 576-578).

[2]The court instructed the jury in relevant part as follows (Tr. 596-597):

> There is a particular instruction I think I should make known to you that relates to your consideration of the testimony of someone who might be labled as an accomplice or a co-actor. Where someone comes into court and describes himself or herself as involved in * * * criminal activity along with one or more of the defendants, and in effect gives testimony that may be damaging to the defendants in the case, then whether we call that person an accomplice or a conspirator or whatever it may be, nevertheless the law says that in considering that testimony, you should do so with great care and caution lest in effect someone be casting off blame and guilt from themselves onto someone else or not telling the complete and whole truth or fabricating or twisting or the like. And in the case of the testimony of Mrs. Weatherspoon, you should consider that with care and caution since according to her testimony she was involved in an illegal operation with one or more of the defendants. So deciding the weight to place on her testimony, consider whether under the circumstances she was telling the truth from this witness stand or whether in some way that didn't represent the truth because of her own involvement and her own situation.

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118 (C.A D.C.), certiorari denied, 421 U.S. 1002; *United States* v. *Ross*, 477 F.2d 551, 542 (C.A. 6), certiorari denied *sub nom. Sain* v. *United States*, 414 U.S. 912; *United States* v. *Castro*, 476 F.2d 750, 753 (C.A. 9); *United States* v. *Curry*, 471 F.2d 419, 422 (C.A. 5), certiorari denied *sub nom. Ciraole* v. *United States*, 411 U.S. 967; certiorari denied, 409 U.S. 1006; *United States* v. *Miceli*, 446 F.2d 256, 258 (C.A. 1).[3]

2. Petitioner also contends (Pet. 20-22) that evidence at a pretrial suppression hearing showed that Weatherspoon's discovery by the government resulted from a prior illegal search conducted by members of the Birmingham, Alabama, Police Department and that, as a consequence, she should not have been permitted to testify at his trial.[4]

But petitioner has never asserted a proprietary interest in the premises searched by the Birmingham police or in the physical evidence seized at that time. He concedes

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[3]Petitioner's reliance (Pet. 13-15) upon *Keliher* v. *United States*, 193 Fed. 8 (C.A. 1), and *Juhl* v. *United States*, 383 F.2d 1009 (Ct. Cl.), reversed on other grounds *sub nom. United States* v. *Augenblick*, 393 U.S. 348, as evidencing a conflict on this issue is misplaced. In *United States* v. *Miceli, supra*, the Court of Appeals for the First Circuit stated that "[i]t is well settled in this circuit that [the uncorroborated testimony of an admitted accomplice] is sufficient for conviction" (446 F.2d at 258). The passage from the Court of Claims' opinion in *Juhl* v. *United States* quoted by petitioner (Pet. 14-15) construed a provision in the *Manual for Courts-Martial* which prohibited, in specified circumstances, basing a conviction on the uncorroborated testimony of a purported accomplice.

[4]On July 11, 1973, members of the Birmingham Police Department searched a hotel room occupied by several persons believed to be involved in the illegal lottery. The evidence seized during that search, including various lottery paraphernalia, was not introduced during trial because the court held that the affidavit supporting the warrant was insufficient to show probable cause (see Pet. App. 5a).

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(Pet. 12), moreover, that he was not present during the search. Petitioner therefore plainly lacks standing to complain that Weatherspoon was discovered as a result of the unlawful search, since it is settled that the rights protected by the exclusionary rule are enforceable only by the individual against whom the unlawful conduct was directed or whose rights were thereby infringed. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 229-230; *Alderman* v. *United States*, 394 U.S. 165, 171-176; *Simmons* v. *United States*, 390 U.S. 377, 389; *Wong Sun* v. *United States*, 371 U.S. 471, 492.

In any event, petitioner's contention that Weatherspoon's discovery by the government resulted from a prior illegal search is without support in the record. Although defense counsel elicited testimony at the pretrial suppression hearing that one or more prospective government witnesses had been discovered as a result of leads developed from the Birmingham police search, the defense did not show that Weatherspoon had been discovered from such leads (see Tr. 28-29). Since petitioner failed to make a *prima facie* showing of taint, the government was not obligated to introduce evidence showing that the discovery of Weatherspoon was attributable to leads developed independent of the unlawful search. See *Nardone* v. *United States*, 308 U.S. 338.

3. As petitioner was leaving a restaurant in Birmingham, he was stopped by an F.B.I. agent and searched pursuant to a search warrant. While the search was being carried out, a co-defendant passed petitioner and stated: "You didn't get away with it after all" (Tr. 369). Petitioner did not respond. The trial court permitted the agent to describe these events to the jury, although it cautioned the jury carefully to weigh the probative value of the testimony before attaching significance to it

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(Tr. 370-371, 598-599). Petitioner nevertheless contends (Pet. 24-27) that the court erred in permitting the F.B.I. agent to testify concerning his silence in the face of the statement of his co-defendant.

As this Court observed in *United States* v. *Hale*, 422 U.S. 171, 176, a defendant's "[f]ailure to contest an assertion * * * is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." It would have been natural for petitioner to contest his co-defendant's accusation, and his failure to do so was quite clearly probative. Given the circumstances in which the accusation and petitioner's failure to respond occurred, moreover, the admission of the testimony in question did not offend any of petitioner's constitutional rights. See *Baxter* v. *Palmigiano*, No. 74-1187, decided April 20, 1976, slip op. 10-11.

Unlike the situation in *Hale*, petitioner was not under arrest at the time of the events in question. Although he was being detained and searched when accused by his co-defendant, he was not undergoing custodial interrogation and he had not therefore been informed of his right to refuse to answer official inquiries—nor was there any official inquiry to which he did not respond. Thus, petitioner was not in the situation of an arrestee who had "been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court" (422 U.S. at 176) and whose "failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication" (*id.* at 177). In short, unlike the situation in *Hale*, the task of identifying the reason for petitioner's failure

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to refute the accusation inherent in his co-defendant's statement to him is not compounded by any valid explanations other than culpability. It would have been natural for petitioner to have objected to the statement had he not been involved in the lottery. His failure to do so was thus probative,[5] and testimony concerning his silence was in no sense the result of or tantamount to compulsory self-incrimination.[6]

4. The remaining contentions presented in the petition were not raised by petitioner in the court below and, accordingly, are not properly before this Court. *Adickes* v. *S. H. Kress & Co.* 398 U.S. 144, 147 n. 2; *Lawn* v. *United States,* 355 U.S. 339, 362-363 n. 16. They are, in any event, without merit.

a. Petitioner contends (Pet. 22-24) that delay by the government in disclosing Weatherspoon's criminal convictions prevented the defense from cross-examining her effectively. But even if the government erred in not disclosing Weatherspoon's criminal record prior to the

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[5]Petitioner also contends (Pet. 26) that the court erred in permitting the F.B.I. agent to testify concerning the statement made by his co-defendant. The statement was admissible, however, to give meaning to testimony concerning petitioner's failure to respond.

[6]Since petitioner was not undergoing custodial interrogation—and had not therefore been advised in accordance with *Miranda* v. *Arizona,* 384 U.S. 436, when he failed to respond to his co-defendant's statement—this case does not involve the situation presented in *Doyle* v. *Ohio,* No. 75-5014, and *Wood* v. *Ohio,* No. 75-5015 (both cases argued on February 23, 1976). Consequently, we do not believe that the present petition should be held pending a decision in *Doyle* and *Wood.*

beginning of her cross-examination by the defense,[7] that error was cured when the government gave her arrest record to the defense and she was recalled to the stand and cross-examined in light of it (Tr. 445-449).[8]

b. Petitioner and six co-defendants were charged in the indictment with conspiracy as well as with the substantive offense of conducting an illegal gambling business in violation of 18 U.S.C. 1955. Following a pre-trial hearing, the court dismissed the conspiracy count.[9] Petitioner

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[7]Petitioner does not attempt to explain why the prosecution had a duty to supply the defense with information that was apparently a matter of public record, and was equally available to the prosecution and the defense. For the reasons explained in our brief in *United States* v. *Agurs*, No. 75-491 (argued April 28, 1976), we do not believe the prosecution had any such duty. There is no occasion in the present case to consider the question of the scope of the prosecution's duty of disclosure, however, since, as noted, the material in question was supplied to the defense and it was fully utilized in cross-examination of Weatherspoon.

[8]Petitioner does not suggest that the delay in informing the defense that Weatherspoon had been convicted previously was the result of conscious wrongdoing by the government, and there is no such evidence in the record.

[9]The court of appeals summarized the trial court's reason for dismissing the conspiracy count as follows (Pet. App. 6a-7a):

> To have left the conspiracy count in the case would have required the United States to establish a starting date of the conspiracy. Judge Pointer's comments from the bench reveal a fear on his part that establishing the starting date posed significant difficulties in avoiding inadvertent references to the illegal search or the products of that search. * * * [T]he dismissal of the conspiracy count hinged on an abundance of caution * * * .

now contends (Pet. 27-30) that the trial court's failure, *sua sponte*, to sever his trial from that of his co-defendants following dismissal of the conspiracy count denied him a fair trial. But petitioner has made no specific allegations of prejudice attributable to his joint trial. Even if petitioner had moved for a separate trial—which, as noted, he did not do—the general considerations advanced by him do not afford a sound basis for departing from the settled rule that if, as here, initial joinder was permissible under Rule 8(b) of the Federal Rules of Criminal Procedure, severance is not required in the absence of a showing of prejudice. See Rule 14, Fed. R. Crim. P.; *Schaffer* v. *United States*, 362 U.S. 511.

c. Petitioner also contends (Pet. 30-32) that the indictment, which charged in the conjunctive several unlawful acts as constituting a violation of 18 U.S.C. 1955, required proof of each of the alleged unlawful acts.[10]. It is settled, however, that where a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count of the indictment, and proof of any one of the methods is sufficient to sustain a conviction. *E.g.*, *Turner* v. *United States*, 396 U.S. 398, 420; *United States* v. *Jones*, 491 F.2d 1382, 1384 (C.A. 9); *United States* v. *Cioffi*, 487 F.2d 492, 499 (C.A. 2), certiorari denied *sub nom. Cuizio* v. *United States*, 416 U.S. 995; *Gerberding* v. *United States*, 471 F.2d 55, 59 (C.A. 8); *United States* v. *Pauldino*, 443 F.2d 1108, 1112 (C.A. 10), certiorari denied, 404 U.S. 882; *United States* v. *Ippolito*, 438 F.2d 417, 419 (C.A. 5), certiorari denied, 402 U.S. 953.

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[10]The indictment charged that petititoner "did conduct, finance, manage, supervise, direct and own" an illegal gambling business. The trial court instructed the jury that any one of these activities would support a conviction (Tr. 610-611).

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d. Finally, petitioner contends (Pet. 32-36) that the court reporter's failure to record nine side-bar conferences between the court and counsel violated the Court Reporters Act (28 U.S.C. 753) and his right to be present at every stage of his trial. But petitioner did not object at trial to the reporting procedures being followed, and he has not pointed to any prejudice resulting from the failure to record the conferences. In these circumstances, we submit that the failure to record the side-bar conferences does not rise to the level of reversible error. *United States* v. *Long*, 419 F.2d 91, 94 (C.A. 5); *Dirring* v. *United States*, 353 F.2d 519, 520 (C.A. 1); see also *United States* v. *Jenkins*, 442 F.2d 429, 438 (C.A. 5); *United States* v. *Sigal*, 341 F.2d 837, 838-839 (C.A. 3).[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
JOHN J. KLEIN,
Attorneys.

MAY 1976.

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[11]Petitioner's reliance upon *Casalman* v. *Upchurch*, 386 F.2d 813 (C.A. 5) and *Edwards* v. *United States*, 374 F.2d 24 (C.A. 10), is misplaced. In *Casalman*, a civil case in which counsels' closing arguments were not reported, the court of appeals affirmed the judgment of the trial court because of the absence of a showing of consequent prejudice. In *Edwards*, the court of appeals held that failure to comply with the Court Reporters Act was not prejudicial error *per se* and affirmed the appellant's conviction since no prejudice had been shown.

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Supreme Court, U. S.
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MAY 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1213

LEWIS CLINTON PIKE, Petitioner

v.

UNITED STATES OF AMERICA

ON

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

JOHN C. SATTERFIELD
Jackson, Mississippi 39205
ROGER A. BROWN
Birmingham, Alabama 35202
GEORGE E. TRAWICK
Post Office Box 47
Ariton, Alabama 36311
ATTORNEYS FOR PETITIONER

HOUSTON PRINTING COMPANY, DOTHAN, ALABAMA 36301

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully files this, his reply brief addressed to arguments first raised in the brief in opposition to the petition for writ of certiorari:

I

The Government argues (pages 6-8, Opposition Brief) that "the task of identifying the reason for petitioner's failure to refute the accusation inherent in his co-defendant's statement to him is not compounded by any valid explanations other than culpability". It was properly admitted over timely objection, argues the Government, because at the time petitioner stood mute in the face of the statement, he was not "undergoing custodial interrogation" but was merely "being detained and searched" by an F.B.I. agent.

Curiously enough, the Government reasons since the F.B.I. agent had **not** informed petitioner of his right to remain silent, the fact that he did so was not an exercise of his Fifth Amendment right but was, instead, evidence of guilt. The Government's argument boils down to this: Detention for search does not excuse a citizen from refusing to answer an accusatory statement or question, and his failure to do so can be used against him.

The Government does not explain the practical difference between "detention for search" and "custodial interrogation". Logic tells us each can be equally employed to obtain evidence from the citizen to be used against him, and the employment of each is limited by the Fourth and Fifth Amendments.

As Mr. Justice Powell said in **United States v. Watson** (1976) 96 S. Ct. 820:

> "Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person is quintessentially a seizure, it would seem that the constitutional provision would impose the same limitations upon arrests that it does upon searches."

In **Miranda,** the Court settled the question of the right of a citizen to remain silent during "custodial interrogation". The question of whether the same right attends the citizen who is detained for search is yet to be answered by this Court and there is division among the Circuits on it. Logic and the apparent weight of authority in the Circuits seem to be that the right to decline to be a witness against ones' self is constitutionally assured to one in custody, regardless of whether the custody is an arrest in the traditional sense followed by incarceration and prosecution or is a detention for search. Whether the police investigation is being accomplished by custodial interrogation or by search or by both should not matter in face of Fourth and Fifth Amendment rights.

Yet, this substantial constitutional question has not been settled by this Court, and it should be. There is division among the Circuits on it.

The District of Columbia Court of Appeals has twice held that the questioning of a person whose movement is restricted during a police search does not constitute "custodial interrogation" within the meaning of **Miranda: Tyler v. United States,** D. C. App. 298 A. 2d 224; **Wells v. United States** D. C. App., 281 A. 2d 226.

But the Fifth Circuit in **Brown v. Beto,** 468 F 2d 1284, held that one who was present during a search of his store under a warrant was in custody rendering inadmissable a self-incriminatory statement made by him to the searchers prior to receipt of the **Miranda** warnings.

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Please compare this with the Governments argument that after the investigation had focused upon him, petitioner's **silence** while being detained and searched was made admissable and probative by the **absence** of a **Miranda** warning.

This argument can be correct only if the Court holds that detention for search is not such "custody" as to entitle the citizen to protection of the Fifth Amendment right of silence while detained for the search. To borrow the words* of Mr. Justice Marshall, the theory "has an odd sound to it".

The more reasonable holding, we submit, and the one comporting more with the spirit as well as the letter of the Fifth Amendment is that the "tacit admission" rule does not apply in search detention situations, just as it does not apply in other custodial investigations. The rationale that a search detention is any less an incursion upon the right to remain silent than an interrogative detention is difficult to fathom.

We are fortified not only by **Brown v. Beto,** supra, but also by **U. S. v. Ghiz,** C.A.W. Va. 1974, 491 F. 2d 599 and **U. S. v. King,** C.A. N.M. 1973, 485 F. 2d 353, together with several well reasoned state court decisions holding that the Fifth Amendment proscribes evidence of accuseds' silence in face of accusations made to him in a custodial situation: **People v. Bobo,** Mich. 1973, 212 N. W. 2d 190; **Davidson v. State,** Okl. Cr. 1974, 521 P. 2d. 1379; **State v. Caster,** N. C. 1974, 204 S. E. 2d 848.

The United States contends (Opposition Brief 8, footnote 6) "this case does not involve the situation presented in **Doyle v. Ohio,** No. 75-5014 and **Wood v. Ohio,** No. 75-5015 (both cases argued February 23, 1976). Consequently, we do not believe that the present petition should be held pending a decision in **Doyle** and **Wood.**"

This is true, argues the United States, because "Petitioner was not undergoing custodial interrogation—and had not therefore been advised in accordance with **Miranda v.**

*Fischer v. United States, 96 S. Ct. 1569, 1590 (1976)

Arizona, 384 U. S. 436, when he failed to respond to his co-defendants' statement."

This contention begs the point. The right not to be compelled to witness against ones' self owes its origin not to **Miranda,** but to the Fifth Amendment. **Miranda** simply protects and reinforces the right, which is not lost due to absence of a **Miranda** warning.

Doyle and Wood differ from this case most materially in that their failure to disclose their alibi at time of their arrest was used against them to attack their credibility as witnesses in their own defense. Here, Petitioner Pike exercised his right to remain silent throughout. Should it be held that **Doyle** and **Wood,** having elected to testify at their trials, could properly be shown to have remained silent at their arrest as going to their credibility as witnesses, this would not dispose of the case sub judice for here the petitioner has consistently insisted on his Fifth Amendment right not to be compelled to witness against him. His credibility as a witness is not an issue.

On the other hand, if the Court decides in favor of **Doyle** and **Wood** on their question of whether the silence of an arrestee is a permissable exercise of Fifth Amendment right for which he cannot be penalized, then these cases should be authority for reversal of the case sub judice.

To this extent, we think this case is intertwined with **Doyle** and **Wood,** but more to the point in disposing of this petition is the clear language of the Court in **Miranda:**

> "In accord with our decision today, it is impermissable to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U. S. at 468, n. 37.

We simply petition the Court to apply this interpretation

of a Constitutional right broadly enough to apply its protection to a custodial situation involving a search on the same basis as a traditional arrest. For practical purposes, they are the same, both being investigation procedures involving detention of the citizen.

II

Under the restrictions of Supreme Court Rule 24(4), we can only address the Court in this reply Brief to arguments first raised in the brief in opposition. Of course, in confining ourselves to answering the Government's argument first raised relative the Fifth Amendment right to remain silent while being detained and searched, the petitioner does not retreat from or abandon any of the grounds urged in the Petition for Writ of Certiorari. The Government does not dispute that the question here replied to, as well as others in the petition, presents a conflict between the Circuits of substantial constitutional matters which have not been, but ought to be, resolved by the Court.

The Governments Brief in Opposition is directed mainly to contentions about the merits of the case and the facts involved. These issues can be met fully and four-square only if the writ is granted, the record sent up, and the parties are both heard fully on the facts and the law arising therefrom.

CONCLUSION

We respectfully submit that it is without dispute the petition sub judice presents substantial constitutional questions on which there is a conflict between the Circuits that has not been, but ought to be settled by the Supreme Court. This case particularly presents the question of whether a citizen detained for search has the Fifth Amendment right to remain silent in face of accusatorial statements.

We renew our prayer: Let the Writ of Certiorari be granted.

Respectfully submitted this 24th day of May, 1976.

George E. Trawick
of Counsel for Petitioner

PROOF OF SERVICE

I, George E. Trawick, one of the attorneys for Lewis Clinton Pike, Petitioner herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24 day of May, 1976, I served copies of the foregoing motion on the United States by delivering the same to: Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530; Hon. Richard L. Thornburgh, Assistant Attorney General; Hon. Jerome M. Feit and Hon. John J. Klein, Attorneys, Department of Justice, Washington, D. C. 20530.

George E. Trawick
Attorney for Petitioner
Post Office Box 47
Ariton, Alabama 36311